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Supreme Court, U.S.
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In The
Supreme Court of the United States
October Term, 1993

TONY LEE, RAMACHANDRAN PALISSERY, RALPH TALARICO, EVE ARNOLD, AND, DAVID WEST, for themselves and all those similarly situated,

Petitioners,

v.

THE LIFE INSURANCE COMPANY OF NORTH AMERICA, THE UNIVERSITY OF RHODE ISLAND, MR. BLAISE MORRISSEY, AND, THE STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS BOARD OF GOVERNORS FOR HIGHER EDUCATION, individually, jointly and severally, in their corporate, official, and personal capacities,

Respondents.

Petition For Writ Of Certiorari
To The United States Court of Appeals
For The First Circuit

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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APPENDIX § A

United States Court of Appeals
For the First Circuit

No. 93-1988

TONY LEE, ET AL.,

Plaintiffs, Appellants,

v.

THE LIFE INSURANCE COMPANY OF NORTH AMERICA, ET AL.,

Defendants, Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF RHODE ISLAND

[Hon. Raymond J. Pettine, Senior U.S. District Judge]

Before

Torruella, Circuit Judge,

Aldrich, Senior Circuit Judge,

and Cyr, Circuit Judge.

Sinclair T. Banks, with whom Keven A. McKenna was

on brief for appellants.

Jay S. Goodman, with whom William P. Devereaux and McGovern, Noel & Benik, Inc. were on brief for University of Rhode Island, et al.

Phillip A. Proger, with whom Jones, Day, Reavis & Pogue were on brief for University of Rhode Island, et al., as to antitrust issues.

May 4, 1994

CYR, Circuit Judge. Three University of Rhode Island ("URI") students appeal from a district court order dismissing their federal antitrust, equal protection, and due process claims against URI, its Board of Governors, three URI officials, and URI's student-health insurer, Life Insurance Company of North America ("LINA"). Finding no error, we affirm the district court judgment.

I

BACKGROUND

As a precondition to reregistering each semester, URI requires all full-time undergraduate students to pay a fixed fee for the right to use URI's on-campus, walk-in medical clinic, University Health Services ("UHS").[1] All students who pay the UHS clinic fee must also carry supplemental health insurance coverage for certain medical services, such as x-rays, lab tests and gynecological tests, that are available through UHS. Two supplemental insurance options are available. First, the student may obtain supplemental insurance through LINA, a private health care underwriter which URI sponsors as its "default" insurer. LINA purportedly "dovetails" its supplemental coverage so that the insured student pays an annual premium that minimizes duplicative coverage; that is, it lessens the risk that the LINA premium and the UHS clinic fee will reflect redundant coverage for the same medical procedures.[2] As a second option, students may secure "comparable [supplemental]

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[1] Graduate students are not required to pay the UHS clinic fee, provided they have health insurance coverage that meets URI's requirements.

[2] LINA coverage requires the student to present for treatment at UHS in the first instance, pending possible referral to an outside health care provider.

coverage" from an off-campus health care insurer of their choice, except that URI does not consider either Rhode Island Blue Cross or Rhode Island-based HMOs "comparable coverage." Students who do not opt out of the LINA "default" coverage by a specified deadline are automatically billed for the annual LINA premium, and cannot reregister for the following semester until the LINA premium has been paid. The automatic "default" scheme notwithstanding, only about 40% of the students who pay the UHS clinic fee insure through LINA.

Appellants initiated this class action in federal district court against URI and LINA in January 1992. The amended complaint alleges that the practice of conditioning continued matriculation at URI on payment of the UHS clinic fee and/or the LINA supplemental insurance premium violates the Sherman Antitrust Act, 15 U.S.C. § 1 (1993), as well as the equal protection and due process guarantees under the United States Constitution. Following minimal discovery, URI and LINA moved to dismiss pursuant to Fed.R.Civ.P. 12(b)(6),[3] and the district court dismissed all claims. Lee v. Life Ins. Co. of N.A., 829 F. Supp. 529 (D.R.I. 1993).[4]

II

DISCUSSION

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[3] Appellants' motion for class certification was stayed pending disposition of appellees' motions to dismiss.

[4] At the same time, the district court declined to exercise jurisdiction over several pendent state-law claims, see 28 U.S.C. § 1367(c)(3) (1993). Cf. infra note 11.

A. The Antitrust "Tying" Claim

Appellants challenge the dismissal of their claim that the URI health care-insurance scheme is an impermissible "tying" arrangement in violation of the Sherman Act, 15 U.S.C. § 1 (1993) ("Every contract . . . in restraint of trade or commerce . . . is hereby declared to be illegal."). See Eastman Kodak Co. v. Image Technical Servs., Inc., 112 S.Ct. 2072 (1992) ("Kodak"). "A tying arrangement is 'an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier.'" Id. at 2079 (quoting Northern Pac. Ry. Co. v. United States, 356 U.S. 1, 5-6 (1958)). Generally speaking, an impermissible "tie-in" occurs if a seller (viz., URI) enjoys either a monopoly or "appreciable economic power" ("AEP") in the "tying" product (or service) market, and uses its considerable market leverage to "coerce" a buyer already intent on purchasing the tying product from the seller into buying a second, "tied" product that the buyer would not have bought based solely on the quality or price of the tied product itself. See Fortner Enters., Inc. v. United States Steel Corp., 394 U.S. 495, 503 (1969); see generally Grappone, Inc. v. Subaru of New England, Inc., 858 F.2d 792, 794-96 (1st Cir. 1988) (describing procompetitive policy interests animating per se tying analysis).[5] Since many product "ties" may not prove anticompetitive, notwithstanding their somewhat misleading epithet, "per se" tie-ins may require a "fairly subtle antitrust analysis" of "market power," a fact-intensive inquiry aimed at winnowing out only those ties most likely to threaten anticompetitive harm. Id. at 795.

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[5] The tie-in must also affect a substantial volume of commerce in the tied market, see Kodak, 112 S. Ct. at 2079, a factor not at issue in this case. Further, we assume, without deciding, that URI is a participant in the insurance "market," for antitrust purposes, simply because it receives a one-time $10 processing fee for each LINA policy sold to a URI student.

Appellants claim three "product" tie-ins: (1) between a university education (URI) and health insurance coverage (LINA); (2) between health care services (UHS) and health insurance coverage (LINA); and (3) between a university education (URI) and health care services (UHS).[6] We agree with the district court however, that appellants failed to allege any "tie-in" claim upon which relief could be granted. In particular, appellants failed to advance a colorable claim as to an indispensable element: that URI had AEP in the relevant tying markets (university education and health care services). AEP or "market power" is the demonstrated ability of a seller "to force a purchaser to do something that he would not do in a competitive market." Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 14 (1984); see also Grappone, 858 F.2d at 794. AEP may be demonstrated, for example, if the seller holds a monopoly in the tying product (e.a., a patented product), controls a very large share of sales in the tying product market, see id. at 796 (AEP "means significant market power" over an "'appreciable' number of buyers") (emphasis in original) (citation omitted), or produces a

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[6] Notwithstanding certain misgivings, we further assume, without deciding, that the amended complaint adequately pleads two other essential "tying" claim elements. These assumptions merely facilitate clearer focus on the core deficiency in appellants' antitrust claim. First, we presume that the products at issue are distinct, i.e., that each is distinguishable by consumers in the relevant market, and that there would be sufficient consumer demand for each individual product, and not merely as part of an integrated product "package." See Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 21-22 (1984). But see id. at 39 (O'Connor, J., concurring) (noting obvious policy limits of "two product" rule, since almost every product could be broken down into smaller constituent parts that might be sold separately); Lee, 829 F. Supp. at 537 ("I do not believe plaintiffs have adequately alleged that this arrangement involved two separate products."). Second, we accept, arguendo, the questionable contention that URI students are "coerced" financially into buying LINA coverage because only LINA insurance "dovetails" with UHS clinic fee services.

"unique" tying product, and therefore faces no significant competition from functionally similar products or services, see Jefferson Parish, 466 U.S. at 37-38 n.7 (O'Connor, ., concurring) (market must be defined to include "all reasonable substitutes for the product"); Grappone, 858 F.2d at 796 (market encompasses all "readily available substitutes").

Appellants can assert no colorable claim that URI holds AEP either in the "tying" market for a university education or in the "tying" market for health care services. URI competes for new undergraduate and graduate students on a regional and national level with dozens of universities and colleges.[7] Although URI obviously is a "unique" institution in a colloquial sense, appellants cannot claim that other institutions of higher education do not or cannot provide "functionally similar" educational offerings to potential URI applicants. Cf. id. at 798 (brand name alone does not establish product "uniqueness" necessary for AEP). And, of course, absent AEP in the university-education market it is a virtual given that URI cannot enjoy AEP in the student health care business.

Appellants attempt to circumvent URI's evident lack of AEP in the two relevant tying markets by contriving a so-called Kodak "lock-in." Kodak involved distinct products: Kodak copiers (the "lock-in" product), Kodak copier replacement parts (the tying product), and Kodak copier servicing and repair (the tied product). In 1985, Kodak began to confine sales of Kodak copier parts to Kodak copier owners who contracted to have their copiers serviced by Kodak, rather than by Kodak's servicing competitors ("ISOs"). Kodak, 112 S.Ct. at 2077-78. Significantly, only Kodak parts would fit Kodak copiers. Id. at 2077. The ISOs initiated an antitrust action against Kodak under section 1 of the Sherman

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[7] As of 1991, for example, Rhode Island residents comprised only 56% of the URI student body.

Act. After truncated discovery, the district court granted summary judgment for Kodak. Id. at 2078. The Ninth Circuit reversed, Kodak, 903 F.2d 612, 617 (9th Cir. 1990), and the Supreme Court affirmed, Kodak, 112 S. Ct. at 2092.

By reason of Kodak's very small market share in copier sales, the parties had stipulated that Kodak had no AEP in the copier market (assuming copier sales to be the relevant "tying" market), and hence, no unlawful "tie" could exist between Kodak copiers and Kodak parts-servicing. Id. at 2081 n.10. The Supreme Court accordingly focused on whether an unlawful tie-in nonetheless existed between Kodak parts and Kodak servicing. Id. Kodak argued for the view that, either presumptively or as a matter of law, vigorous competition in the copier market would prevent Kodak from raising its parts and servicing contract prices above competitive levels, because any such price increases in these derivative aftermarkets" would become known to copier-equipment consumers, and eventually cause Kodak to lose ground to its competitors in copier sales. Id. at 2081-82, 2083.

The Court rejected Kodak's per se "cross-elasticity of demand" theory, identifying two different fact patterns which, if borne out by the evidence, might support a reasonable inference that parts and servicing contract price increases would not necessarily cause Kodak to lose copier sales. Under the first scenario, the evidence might demonstrate that a substantial number of consumers, at the time of their original copier purchases, would not enjoy cost-efficient[8] access to the difficult-to-acquire pricing information needed to evaluate the total "life-cycle" cost of the entire Kodak

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[8] The Court noted that even assuming readily available price information, consumers rationally might decide not to investigate lifecycle costs if investigation would prove more costly than the potential savings. Id. at 2086.

"package" - namely, the price of the copier, likely replacement parts, and product-lifetime servicing. Id. at 2085-87. Under the second scenario, the Court postulated that, in a market for complex durable goods like copiers, current Kodak-copier owners might tolerate even uncompetitive price increases in Kodak parts and servicing as long as the increases did not exceed the costs of abandoning their original investment in the Kodak copier and switching, for example, to a Canon or Xerox copier. Id. at 2087-88. Since Kodak's servicing competitors had produced some evidence of "very high" switching costs for Kodak copier owners, the Court opined that such "lock-ins" attendant as they are to the original copier purchase could conceivably enable the plaintiff ISOs to establish Kodak's AEP in the derivative "tying" aftermarket for Kodak parts. The Court accordingly concluded that the undetermined "information costs" and "switching costs" represented material issues of fact, and if in genuine dispute, would preclude summary judgment, even though Kodak lacked AEP in the "lock-in" product market for copiers. Id. at 2086-87.

Appellants attempt to shoehorn their allegations into this Kodak "derivative aftermarket" mold, by proposing the following comparative model: first-semester matriculation at URI serves as the "lock-in" product, as did the Kodak copier; subsequent semesters at URI serve as the tying product, as did Kodak replacement parts; and health clinic services and health insurance coverage represent the tied products. Of course, URI, like Kodak, might contend, on summary judgment or at trial, that its lack of AEP in the locked-in product market ("sales" of first-semester university education) creates a "cross-elasticity of demand," which would prevent health clinic fees and LINA supplemental insurance premiums from being increased to uncompetitive levels. Nevertheless, because Kodak was a summary judgment case, rather than a Rule 12(b)(6) case, appellants argue that they did enough to withstand URI's motion to dismiss simply by alleging the existence of unspecified "information" and "switching" costs,

which must be credited for Rule 12(b)(6) purposes. See Rumford Pharmacy, Inc. v. City of East Providence, 970 F.2d 996, 997 (1st Cir. 1992) (review of Rule 12(b)(6) dismissal is de novo, crediting all allegations in the complaint and drawing all reasonable inferences favorable to plaintiff).

Appellants challenge the district court ruling that their "information cost" allegations were insufficient to defeat the motion to dismiss. First, appellants argue that URI cannot posit a "cross-elasticity of demand" in the present context because the prices charged for health clinic services and insurance premiums are too insignificant in relation to tuition and other university-education costs to be considered a meaningful factor in determining whether potential applicants for admission will attend URI or some other university. Alternatively, appellants argue that URI would bear the burden of proof on this issue at trial, and that on appeal it has not pointed to supportive evidence of consumer "sophistication".

Appellants exaggerate the role that summary-judgment burden shifting played in the Kodak analysis. Kodak simply pointed out that summary judgment was not yet in order on Kodak's "cross-elasticity of demand" theory (1) in light of the plaintiff ISOs' proffer on "information costs" i.e., readily inferable expenses associated with accumulating technical information relating to the costs of equipment, parts, and servicing over the lifetime of a "complex durable goods" item, and (2) in the absence of any conclusive evidence from Kodak that a substantial number of purchasers actually make accurate pre-purchase assessments of the lifecycle "package" price of their Kodak copiers. Thus, the Court neither discussed any reallocation of burdens of proof at trial, nor in any way intimated a shift in the evidentiary burden of proof on the factual issues of "information costs" and "lock-in." See, e.g., Jefferson Parish, 466 U.S. at 13-14 (assuming burden of proof rests with plaintiff to show AEP in tying-product market); Town Sound and Custom Tops, Inc. v.

Chrysler Motors Corp., 959 F.2d 468, 479 n.12 (3d Cir.) (plaintiff bears burden of proof on "tying market" definition), cert denied, 113 S. Ct. 196 (1992). In order to withstand URI's motion to dismiss for failure to state a claim, therefore, it was appellants' burden (absent any colorable claim that URI had AEP in the locked-in product markets for university education and student health services) to allege "information costs" which would prevent a substantial number of URI students from accurately assessing the total costs of a URI education, including health clinic fees and insurance premiums, in determining whether to matriculate at URI.

Second, appellants argue that it is impossible to allege "information costs" because potential URI applicants cannot know or predict their future URI health clinic fees and LINA insurance premiums with any precision, since URI and LINA reserve the right to increase these charges each year. But appellants mistake the focus of the Court's concerns about the "information costs" in Kodak.

In Kodak, the information required by the customer pertained to the lifecycle pricing of a Kodak copier "package," information so patently "difficult and costly" to come by that it spontaneously gave rise to a reasonable inference that unsophisticated consumers would not have the information needed to evaluate their options at the time they made their decision to purchase a Kodak copier. Kodak, 112 S. Ct. at 2085.[9] By contrast, before signing up for their first

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[9] The Kodak Court elaborated on the complexity of the "information" needed to make an informed investment:

"In order to arrive at an accurate price, a consumer must acquire a substantial amount of raw data and undertake sophisticated analysis. The necessary information would include data on price, quality, and availability of products needed to operate, upgrade, or enhance the initial equipment, as well as service and repair costs, including estimates of breakdown frequency, nature of repairs, price of service and parts, length of

semester at URI, students are informed that their continued matriculation at URI is conditioned, inter alia, on their "purchase" of health clinic services at a stated annual fee, subject to historically predictable annual increases, and on their purchase of supplemental insurance coverage.[10] See Philip E. Areeda & Herbert Hovenkamp, Antitrust Law ¶ 1709.2, at 1174 (Supp. 1993) (Kodak does not focus on potential exploitation of the "irrational or foolish" purchaser, but the purchaser who makes the rational decision that comparative-shopping costs would outweigh any savings from a fully informed purchase; "the [Kodak] context was confined to hard-to-obtain information") (emphasis added); cf. id. at 1174 ("[R]elevant information need not be so comprehensive as a binding future price schedule"); see also supra note 8. Appellants have made no allegations sufficient to give rise to a reasonable inference that the healthcare and insurance-cost

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"downtime" and losses incurred from downtime.

Much of this information is difficult some of it is impossible to acquire at the time of purchase. During the life of a product, companies may change the service and parts prices, and develop products with more advanced features, a decreased need for repair, or new warranties. In addition, the information is likely to be customer specific; lifecycle costs will vary from customer to customer with the type of equipment, degrees of equipment use, and costs of downtime." Kodak, 112 S.Ct. at 2085-86.

[10] Considering the recent hyperinflationary trends in the health care industry as a whole, UHS clinic fees have increased at fairly predictable increments since 1987: 1987-88 ($179); 1988-89 ($188); 1989-90 ($200.50); 1990-91 ($227); 1991-92 ($248); 1992-93 ($312). LINA premiums have increased comparably over the same period, from $158 in 1987-88 to $369 in 1992-93. The record contains no evidence that prospective URI applicants would have great difficulty gaining access to this information from any number of reliable sources (e.g., URI application materials, URI admissions officials, past or current URI students, college entrance source books). Nor do appellants suggest that URI had any incentive to conceal the scope of past price increases. On the billing invoices it mails to students, URI routinely individualizes its charges for registration, tuition, UHS fees, LINA premiums, and taxes.

information needed to make an informed decision whether to accept the preconditions to continued matriculation at URI is either difficult or expensive to obtain or correlate.

The district court further ruled that appellants failed to state an actionable claim that they were "locked in"; that is, they failed to plead actual costs associated with switching from URI after their first semester. Although appellants now assert that they can amend their complaint to allege such costs, we conclude that further amendment to allege specific "switching costs" would be futile. See University of Rhode Island v. A.W. Chesterton Co., 2 F.3d 1200, 1219 n. 20 (1993).

First, there is an important distinction between Kodak and the present case. Kodak was a "derivative aftermarket" case involving "complex durable goods." Unlike the copier parts in Kodak, subsequent URI semesters are not "derivative aftermarket" components upon which the buyer's initial investment absolutely depends. As the Supreme Court noted, Kodak copiers are "expensive when new," incompatible with replacement parts used in other copiers, and retain "little resale value" presumably because complex durable goods depreciate so rapidly. Kodak, 112 S.Ct. at 2077. The "lock-in" would occur provided it could be shown that Kodak copier owners must either purchase replacement parts from Kodak or abandon their initial, unamortized investment in their Kodak copier. In contrast, a completed first semester at university is discretely priced - students do not pay for their entire four-year stint in advance - and the "college credit" value of the first semester is neither nontransferable nor without economic or educational value in the future even if the student does not remain at URI. Thus, appellants' attempt to extend Kodak, beyond the "derivative aftermarket" context to the educational context, is problematic at best.

Second, the timing of the "lock-in" at issue in Kodak was central to the Supreme Court's decision. Unsophisticated

Kodak copier owners were destined for "lock-in" from the moment they purchased their Kodak copiers. At the time current Kodak copier owners bought their copiers, Kodak had not yet conditioned its sale of replacement parts on the purchase of Kodak servicing, and its later-announced policy to that effect was made applicable both to prospective and existing Kodak copier owners. Had previous customers known, at the time they bought their Kodak copiers, that Kodak would implement its restrictive parts-servicing policy, Kodak's "market power," i.e., its leverage to induce customers to purchase Kodak servicing, could only have been as significant as its AEP in the copier market, which was stipulated to be inconsequential or nonexistent. See Kodak, 112 S.Ct. at 2095-96 (Scalia, J., dissenting) (noting that even the Kodak majority probably would have found no "lock-in" had Kodak announced its parts-service "tie" at the time of its market entry); see generally Philip E. Areeda, supra, ¶ 1709.2, at 1164-68 (same). In the instant case, however, students know before their matriculation that they are buying a URI "package" that includes at least two "tied" products a URI education and on-campus health care services and insurance. As appellants failed to assert a colorable claim that URI had AEP in the primary (university education) market, no Kodak-type "lock-in" could have occurred in subsequent semesters, and even the most detailed allegations of "switching costs" would be wholly unavailing.

B. The "Due Process" and "Equal Protection" Claims

Appellants attempt to raise two vaguely articulated constitutional challenges to the URI health services-insurance scheme. First, they argue that URI's conditioning of continued matriculation on the payment of a health clinic fee violates their constitutional right to procedural due process, by depriving them of a property interest (fees and premiums), and a liberty-privacy interest (the alleged right to retain a physician of one's choice). Unsurprisingly, appellants cite no case authority for either contention, nor have we found

any.[11] Appellants purchased a "product" - "service" from URI with full knowledge from the outset that health care fees and supplemental insurance premiums were a required component of the cost. We perceive no procedural infirmity.

Second, appellants argue that the URI "package" infringes their constitutional right to equal protection of the laws because male and female students matriculating at URI must pay the same health care fees, even though male students will not utilize the UHS gynecological services. The district court aptly found that appellants failed to allege that URI imposed this unitary scheme with any discriminatory animus aimed at male students. See Nieves v. University of Puerto Rico, 7 F.3d 270, 276 (1993) (plaintiff contesting classification-neutral statutes on equal protection grounds must

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[11] The district court interpreted appellants' complaint as alleging claims based on substantive due process and the right to contract. Appellants concede that their "cumbersome briefing" contributed to this understanding, yet did not move for reconsideration. See Vanhaaren v. State Farm Mut. Auto. Ins. Co., 989 F.2d 1, 45 (1st Cir. 1993) (issues raised for the first time on appeal are deemed waived). Unfortunately, the procedural due process claim asserted on appeal is no less unwieldy.

Inexplicably, appellants continue to urge that Rhode Island law disempowered URI from entering the "business" of health care and insurance, and that the LINA policies were merely a fraud or sham affording students no actual coverage. Although these allegations might be material to appellants' ultra vires claim under state law, which the district court dismissed without prejudice, cf. Boston Envtl. Sanitation Inspectors Ass'n v. City of Boston, 794 F.2d 12, 13 (1st Cir. 1986) (noting that state actor's "[m]ere violation of state statutory requirements does not offend federal constitutional due process"), or conceivably may have served as a basis for some sort of consumer protection claim, appellants do not explain how URI's mere refusal to continue selling them a service (i.e., education) would constitute an actionable "deprivation" of their "property rights" for federal due process purposes. Cf. id. (noting that "an alleged breach of contract [by a state actor] does not amount to a deprivation of property without due process"); Jimenez v. Almodovar, 650 F.2d 363, 370 (1st Cir. 1981) (same).

proffer not only evidence of disparate effect, but evidence that enactment resulted "because of," rather than "in spite of," classification) (citing Personnel Adm'r of Massachusetts v. Feeney, 442 U.S. 256, 278-80 (1979)); Lipsett v. University of Puerto Rico, 864 F.2d 881, 896 (1st Cir. 1988). Appellants advance no curative allegations for relieving this infirmity.

Affirmed.

APPENDIX § B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

TONY LEE,
RAMACHANDRAN PALISSERY,
and, RALPH TALARICO,
for themselves and all
those similarly situated

Plaintiffs

v. C.A. No. 92-0058 P

THE LIFE INSURANCE
COMPANY OF NORTH
AMERICA, THE
UNIVERSITY OF RHODE
ISLAND, MR. EDWARD
EDDY, MR. ROBERT
CAROTHERS, MR. BLAISE
MORRISSEY, THE STATE
OF RHODE ISLAND AND
PROVIDENCE PLANTATIONS
BOARD OF GOVERNORS FOR
HIGHER EDUCATION,
AND, ONE OR MORE
JOHN DOES, individually,
jointly and severally, in
both their corporate
capacities, and, in
their personal and
official capacities

Defendants.

MEMORANDUM AND ORDER

PETTINE, RAYMOND J., Senior U.S. District Judge

This is a class action lawsuit on behalf of current and former students at the University of Rhode Island ("URI" or "the university").[1] Plaintiffs allege a multitude of federal and state claims attacking the university's mandatory health clinic fee and health insurance requirement. Jurisdiction is premised on 28 U.S.C. § 1331 (federal question); 28 U.S.C. § 1337(a) (antitrust); 28 U.S.C. § 1343(a) (civil rights); and 28 U.S.C. § 1367(a) (supplemental).

Defendants have moved to dismiss this suit under Fed.R.Civ.P. 12(b)(6) for failure to state a claim. For the reasons stated below, I grant defendants' motion with respect to all federal claims. In addition, I decline to exercise supplemental jurisdiction over the pendant state claims, and dismiss those claims without prejudice.

I. Standard of Review

It is not proper to dismiss a complaint under Fed.R.Civ.P 12(b)(6) unless "it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." Hishon v. King & Spalding, 467 U.S. 69, 73 (1984)(citing Conley v. Gibson, 335 U.S. 41, 45-46 (1957)). In making this determination, a court should accept the well-pleaded complaint as true and indulge every reasonable inference in favor of the plaintiff. Correa-Martinez v. Arrillaga-Belendez, 903 F.2d 49, 52 (1st Cir. 1990). This standard of review "does not mean, however, that a court must (or should) accept every allegation made by

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[1] No plaintiff class is currently certified. All parties have agreed to a stay of plaintiffs' motion for class certification pending resolution of defendants' motion to dismiss.

the complainant, no matter how conclusory or generalized." U.S. v. Avx Corp., 962 F.2d 108, 115 (1st Cir. 1992).

II. Background

URI operates a University Health Services ("UHS" or "health clinic") on its Kingston, Rhode Island campus. UHS offers ambulatory services and health education to URI undergraduate and graduate students by walk-in or by appointment. It is open 24 hours per day, seven days per week during the academic year.

URI imposes a mandatory health clinic fee for full-time undergraduate and graduate students. Full-time graduate students may only waive the health clinic fee if they are a member of a health maintenance organization, or a member or dependent of the military. Undergraduate students may only waive the fee if they enroll in fewer than 12 hours per semester. In 1991-92, the health clinic fee was $124.00 per semester.

URI also requires full-time students to carry health insurance to supplement the medical coverage provided through UHS. Students may satisfy this requirement in two ways. They may (1) purchase a private health insurance policy offered through URI or (2) demonstrate that they have "comparable coverage" through some other health insurance plan. In 1990-91 and 1991-92, the URI-sponsored policy was available through defendant The Life Insurance Company of North American ("LINA"). The cost of the LINA policy (12 month coverage) was $282.00 for 1990-91 and $330.00 for 1991-92.

The LINA plan was designed to "dovetail" with medical services provided at UHS. Thus, a student enrolled in the LINA plan would only pay for coverage of health services not provided through the student's mandatory health clinic fee. Additionally, under the LINA plan, insurance

coverage was only available if students first sought medical assistance from UHS. If necessary, a student was then referred to an outside health care provider by UHS. If UHS was closed (e.g., during official university holidays and the summer), students were required to notify UHS of any medical actions taken.

Students opting for "comparable" plans in 1990-91 and 1991-92 were required to submit a waiver card to the university by a date certain. Failure to submit the waiver card resulted in automatic enrollment in, and billing for, the LINA plan. If the LINA bill was not paid, URI prohibited future registration of that student. URI warned its students in writing that comparable coverage plans must pay for laboratory tests, x-rays, orthopedic supplies and selected gynecological procedures performed at UHS. URI also cautioned its students that Rhode Island Blue Cross and health maintenance organizations in Rhode Island were not deemed "comparable" plans.

In 1990-91 and 1991-92, approximately 40% of the more than 10,000 URI students acquired health insurance through LINA. The remaining 60% obtained coverage from other carriers. While the university claims that it makes no profit on the insurance requirement, it does collect a $10.00 administrative fee for processing each student. In addition, UHS is supported, in part, by the laboratory, x-ray, orthopedics and gynecological fees that are paid by student insurance carriers.

On January 31, 1992, plaintiffs filed the present action. Unfortunately, there is no simple way to summarize plaintiffs' legal theories. They have adopted an everything-but-the-kitchen-sink approach to this case. Plaintiffs' amended complaint is a 45 page single-spaced document crammed full of federal and state claims. On the federal side, there are numerous antitrust allegations, as well as claims under the Equal Protection and Due Process clauses of the Fourteenth

Amendment to the United States Constitution. On the state side, plaintiffs' claims include Money Had and Received, Breach of Contract, Duress, Negligent Misrepresentation, Innocent Misrepresentation, Breach of Insurer's Duty to Deal Fairly and in Good Faith, Negligence, Breach of Implied Contract, Breach of Fiduciary Duty and Ultra Vires. Plaintiffs also assert equal protection and due process claims under the Rhode Island Constitution, and claims under Rhode Island antitrust statutes.[2] At its core, this suit seeks to recoup health clinic fees and LINA insurance premiums paid by plaintiff URI students, plus treble damages for antitrust violations.

III. Discussion

A. Federal Antitrust Claims

I begin my scrutiny of the amended complaint with the federal antitrust allegations (Counts VII, XVI). Plaintiffs advance three antitrust claims: (1) conspiracy claims under 1 of the Act; (2) per se tying claims under §1 of the Sherman Act; and (3) conspiracy to monopolize claims under §2 of the Sherman Act. Defendants' primary argument in support of their motion to dismiss is that plaintiffs have failed to adequately allege the essential elements of any antitrust

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[2] Plaintiffs' sweeping litigation strategy is not confined to their complaint. Plaintiffs originally filed with this Court a two volume, 357 page single-spaced Memorandum In Support Of Their Objection To Defendants' 12(b)(6) Motion To Dismiss. This Court then directed plaintiffs to resubmit a memorandum of law not more than 60 double-spaced pages. Plaintiffs only superficially complied with the Court's instructions. While they did file a 60 page abbreviated memorandum, plaintiffs repeatedly cross-reference crucial material in the abbreviated memorandum to voluminous passages contained in the original 357 page brief. In the interests of judicial economy, this Court has overlooked plaintiffs' mishandling of this motion and considered arguments contained in both the original and abbreviated filings.

violations.[3]

1. Conspiracy Claims Under §1 of the Sherman Act

Section 1 of the Sherman Act states that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." 15 U.S.C. §1. Despite this sweeping language, the U.S. Supreme Court has long recognized that the Act prohibits only unreasonable restraints of trade. Business Electronics Corp. v. Sharp Electronics Corp., 485 U.S. 717, 723 (1988).

To determine unreasonable restraint of trade, courts generally evaluate the alleged anticompetitive actions "through case-by-case application of the so-called rule of reason test that is, 'the factfinder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition.'" Id. (quoting Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 49 (1977)). In the First Circuit's words, "[t]he 'rule of reason' limits the Act's literal words by forbidding only those arrangements the anticompetitive consequences of which outweigh their legitimate business justifications..." Clamp-All Corp. v. Cast Iron Soil Pipe

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[3] Defendants also contend that they have antitrust immunity from suit based upon three separate grounds: (1) the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-15, which provides an antitrust exemption for the "business of insurance"; (2) the so-called "state-action" doctrine, which offers immunity for actions taken by state government and certain private actors; and (3) the Local Government Antitrust Act, 15 U.S.C. §§ 34-36, which bars antitrust damage actions against local governments, including "special function governmental unit[s] established by State law in one or more States." Because I hold that plaintiffs have failed to state a valid claim under either §1 or §2 of the Sherman Act, there is no need to address these defenses.

Institute, 851 F.2d 478, 486 (1st Cir. 1988), cert. denied, 488 U.S. 1007 (1989). In this special context, the term "'anticompetitive'...refers not to actions that merely injure individual competitors, but rather to actions that harm the competitive process. And, the law assesses both harms and benefits in light of the Act's basic objectives, the protection of a competitive process that brings to consumers the benefits of lower prices, better products, and more efficient production methods." Id. (citations omitted).

In limited circumstances, courts will apply a per se standard to antitrust allegations under §1. The per se approach is appropriate where the challenged conduct is "manifestly anticompetitive" and thus no in-depth analysis of the market effect is necessary. Business Electronics, 485 U.S. at 723-24. Examples of per se violations include price-fixing schemes and concerted refusals to deal. Jefferson Parish Hospital District No. 2 v. Hyde, 466 U.S. 2, 9 and n. 10 (1984); U.S. Healthcare, Inc. v. Healthsource Inc., 986 F.2d 589, 593 (1st Cir. 1993).

Thus, to state a valid claim under §1 of the Sherman Act, a plaintiff must allege three elements: (1) the existence of a contract, combination or conspiracy: (2) that the agreement unreasonably restrained trade under the per se or rule of reason analysis; and (3) that the restraint affected interstate commerce. See Bhan v. NME Hosp., Inc., 929 F.2d 1404, 1410 (9th Cir.), cert. denied, _ U.S. _, 112 S.Ct. 617 (1991). See also ABA Antitrust Section, Antitrust Law Developments 2 (3d ed. 1992).

In the present case, plaintiffs allege a litany of interconnected claims under §1 of the Sherman Act that relate to some type of conspiracy or exclusionary arrangement between URI and LINA:

> (1) URI and LINA conspired in imposing the mandatory clinic fee and insurance requirement.

Amended Complaint at ¶¶ 97, 112, 152, 255, 256.

(2) URI and LINA conspired in requiring students covered by LINA to first seek treatment at the URI clinic to obtain insurance coverage. Amended Complaint at ¶¶ 113, 114

(3) URI and LINA conspired to dictate alternative insurance coverage (i.e., non-LINA) in terms of the health clinic's revenue raising procedures. Amended Complaint at ¶ 127.

(4) URI and LINA conspired to automatically charge some students for the full annual amount of the LINA plan, even though LINA coverage did not actually begin until students paid their bill. Amended Complaint at ¶ 106.

(5) URI and LINA conspired to require "more of a non-LINA policy than is furnished by the LINA policy." Amended Complaint at ¶ 120.

(6) URI and LINA conspired in "carrying out URI's requirement that male students have health insurance that includes coverage for gynecological services..." Amended Complaint at ¶ 134.

(7) URI and LINA conspired in "the URI clinic fee's female coverage component for men ..." Amended Complaint at ¶ 138.

Plaintiffs appear to concede that these allegations should be viewed through the rule of reason lens. But they argue that the anticompetitive nature of the mandatory health

clinic fee and insurance requirement is "self-evident." Plaintiffs' Abbreviated Memorandum at 23. I believe that the rule of reason approach is proper in this case. Plaintiffs do not cite any cases to support a per se violation, and this Court's research has not unearthed any such precedent. Given this finding, plaintiffs' conspiracy claims must be dismissed.

Plaintiffs' amended complaint does not present sufficient facts to indicate how these challenged actions unreasonably restrained trade in any relevant market, or had significant adverse effects on competition. Only two facts in the amended complaint shed any light on anticompetitive effects. The first is that Rhode Island Blue Cross and health maintenance organizations in Rhode Island were not considered "comparable" insurance plans. The second is that the LINA plan was intentionally "dovetailed" with UHS to provide an insurance package less expensive than that available from other carriers.

These facts are not sufficient to show how the clinic fee or insurance mandate unreasonably restrained trade or harmed the competitive process. Plaintiffs have not pled any facts suggesting that URI or LINA coerced students into buying the LINA plan, or that they sought to unfairly exclude competitors from insuring URI students. Rather, URI allowed students to choose between LINA or "comparable" coverage plans. This policy, plaintiffs acknowledge, resulted in a majority of URI students opting for non-LINA policies. Amended Complaint at ¶ 144 ("Thousands of URI students have non LINA/URI health insurance"); Plaintiffs' Abbreviated Memorandum at 28 n.74, 32-33 (approximately 40% of URI students bought LINA insurance).

Moreover, simply because certain insurance plans were not deemed "comparable" is not enough evidence, standing alone, to suggest significant anticompetitive effects. See, e.g., Reazin v. Blue Cross and Blue Shield, 899 F.2d 951,

960 (10th Cir.), cert. denied, 497 U.S. 1005 (1990)(with rule of reason claim under §1 of the Sherman Act, "the adverse impact must be on competition, not on any individual competitor or on plaintiff's business") (emphasis in original): Les Shockley Racing Inc. v. National Hot Rod Ass'n, 884 F.2d 504, 508 (9th Cir. 1989)("removal of one or a few competitors need not equate with injury to competition" under rule of reason §1 claim).

In short, plaintiffs have failed to adequately allege in their amended complaint how URI and LINA conspired to unreasonably restrain trade under §1 of the Sherman Act. There is no need for this Court to determine the existence of a contract, combination or conspiracy, or whether the challenged actions affected interstate commerce.

2. Tying Claims Under §1 of the Sherman Act

Plaintiffs' second cluster of antitrust claims are per se tying allegations under §1 of the Sherman Act. A tying arrangement is an agreement by one party to sell a product (the tying product) only on the condition that the buyer purchases a second product (the tied product), or at a minimum, that the buyer agrees that it will not purchase the second product from any other seller. Eastman Kodak Co. v. Image Technical Services, Inc., _ U.S. _, 112 S.Ct. 2072, 2079 (1992); Northern Pacific Railway Company v. United States, 356 U.S. 1, 56 (1958). The Supreme Court has long recognized that "certain tying arrangements pose an unacceptable risk of stifling competition and therefore are unreasonable 'per se'." Jefferson Parish, 466 U.S. at 9. The caselaw indicates that a per se tying violation occurs where: (1) there is a tie of two separate products; (2) the seller has "appreciable" or "sufficient" economic power in the tying product market; and (3) the tie affects a substantial volume of commerce in the tied product market. See Kodak, 112 S.Ct. at 2079; Jefferson, 466 U.S. at 16-22; Fortner Enterprises, Inc. v. United States Steel Corp., 394 U.S. 495, 498-503

(1969). See also Grappone, Inc. v. Subaru of New England, Inc., 858 F.2d 792, 794 (1st Cir. 1988).[4]

Plaintiffs allege three separate tying arrangements. The first arrangement is between a URI education (tying product) and URI's health clinic (tied product). Amended Complaint at ¶¶ 109, 253. The second is between URI's health clinic (tying product) and the LINA insurance (tied product). Amended Complaint at ¶ 149. The third is between a URI education (tying product) and the LINA insurance (tied product). Amended Complaint at ¶ 98.

With all due respect to plaintiffs' efforts in this area, I believe their amended complaint fails to state a viable tying claim. To begin, for two of the three alleged tying arrangements the health clinic and LINA insurance, and URI education and LINA insurance plaintiffs have simply not alleged sufficient facts to show that an actual tie existed. Plaintiffs do not indicate that URI conditioned a university education or health clinic services on the purchase of LINA insurance. As noted above, students were given a choice of subscribing to the LINA plan or choosing a "comparable"

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[4] In theory, it is also possible to prove that a tying arrangement violates §1 of the Sherman Act under the rule of reason. Under the rule of reason unlike the per se test a plaintiff bringing a tying claim "has the burden of proving that the [challenged action] violated the Sherman Act because it unreasonably restrained competition." Jefferson Parish, 466 U.S. at 29. The First Circuit has interpreted this requirement to mean that a plaintiff cannot show a tying violation in the absence of the per se rules unless the tie's anticompetitive effects outweigh its legitimate business justifications. Grappone, 858 F.2d at 799.

In the current action, plaintiffs do not articulate a rule of reason challenge. Nor do they allege sufficient facts in the amended complaint that point to significant anticompetitive effects in any tied product market. Thus, I conclude that plaintiffs have failed to state a rule of reason tying claim.

plan.[5]

With respect to the remaining alleged arrangement -- URI education and the mandatory health clinic fee -- most students were obliged to pay the health clinic fee. Nevertheless, I do not believe plaintiffs have adequately alleged that this arrangement involved two separate products. In Jefferson Parish, supra, the U.S. Supreme Court stated "that the answer to the question whether one or two products are involved turns not on the functional relation between them, but rather on the character of the demand for the two items." 466 U.S. at 19. Stated another way, a tying arrangement must "link two distinct markets" where there is "sufficient demand" for each product. Id. at 19-22. See also Kodak, 112 S.Ct. at 2080.

In the case at hand, plaintiffs have not legitimately alleged that the URI health clinic is part of product market separate from a URI education. They merely argue in their briefs that students go to URI for its academic offerings, not for mandatory clinic coverage. But this conclusory statement does not indicate the existence of a separate market for student clinic services available to URI students.

An additional fatal flaw in all three purported tying schemes is plaintiffs' failure to adequately allege significant economic power in a relevant tying market. "Market power is the power 'to force a purchaser to do something that he

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[5] Plaintiffs argue that the health insurance requirement precludes some students from employing "self-insurance." Abbreviated Memorandum at 24. If students do not wish to purchase any insurance, however, the university's mandate lacks anticompetitive consequences. "[W]hen a purchaser is 'forced' to buy a product he would not have otherwise bought even from another seller in the tied-product market, there can be no adverse impact on competition because no portion of the market which would otherwise have been available to other sellers has been foreclosed." Jefferson Parish, 466 U.S. at 16. See also Grappone, 858 F.2d at 799.

would not do in a competitive market."' Kodak, 112 S.Ct. at 2080 (quoting Jefferson Parish, 466 U.S at 14). "The existence of such power ordinarily is inferred from the seller's possession of a predominant share of the market." Id. at 2081. Market power may also be shown where a seller offers a unique product that competitors cannot offer such as a patented product or a special tract of land. Jefferson Parish, 466 U.S. at 16-17; Grappone, 858 F.2d at 796.

Plaintiffs argue that there is sufficient proof of economic power in both of the relevant tying product markets. With respect to the URI education, plaintiffs declare that "URI easily enjoys 'a significant market share' of the higher education business of URI students." Plaintiffs' Abbreviated Memorandum at 20. Plaintiffs' market power arguments concerning URI's mandatory health clinic fee are inextricably linked to their URI education market assertions. They state: "Given URI's market power in URI students' education, and that clinic fee risk coverage is tied by it, URI also has market power in said risk coverage." Plaintiffs' Abbreviated Memorandum at 20.

Plaintiffs assert that this market definition is justified because the vast majority of students do not transfer to other schools once they enroll at URI. Several reasons for this low transfer rate, according to plaintiffs, are the trouble and expense for a URI student to transfer to another school, problems transferring URI academic credits to another university, a student's aversion to leaving family or friends, and the higher tuition and costs at other universities. Plaintiff's Original Memorandum at 160-61. In essence, plaintiffs assert that students become "locked-in" to a URI education once they enroll, even if the university does not possess significant economic power over prospective students

before they first matriculate.[6] Plaintiffs' Original Memorandum at 161-63. This "lock-in" provides URI with market power over the continued education of its students.

Last year, the U.S. Supreme Court provided support for this line of argument in Eastman Kodak, supra. In Kodak, independent service organizations brought an antitrust action under §1 and §2 of the Sherman Act challenging Eastman Kodak's policy of restricting the availability of spare parts for its photocopier and micrographic equipment to only those customers who serviced their own machines or hired Kodak service. 112 S.Ct. at 2076-77. The Ninth Circuit determined that Kodak was not entitled to summary judgment on the §1 tying claims because there was an issue of material fact whether Kodak's economic power in the tying product market (spare parts) restrained competition in the tied product market (service). The Court of Appeals also concluded that summary judgment was inappropriate on the §2 claims. Id. at 2078-79.

Kodak argued in the Supreme Court "that even if it concedes monopoly share of the relevant parts market, it cannot actually exercise the necessary market power for a Sherman Act violation ... because competition exists in the equipment market [i.e., Kodak and other equipment brands]." Id. at 2081 (emphasis in original). Kodak asked the Court to adopt a legal presumption that equipment competition precludes a finding of monopoly power In the service or parts "aftermarkets." Id. at 2082. The Court rejected this argument in affirming the Ninth Circuit's ruling. In

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[6] Plaintiffs do suggest in passing, however, that "[b]efore the prospective student enrolls at any university, URI has market power regarding that prospective student if s/he is not admitted anywhere else or cannot afford to go anywhere else, or, lacks a non-URI option for any other reason." Plaintiff's Original Memorandum at 161 (emphasis in original). Plaintiffs do not expand upon this highly speculative theory of market power, and thus I believe it merits no attention from the Court.

addressing the §1 tying claims, it held that there was a question of fact over: (1) whether there was sufficient information in the marketplace about the "lifecycle" costs of maintaining this type of equipment at the time of purchase; and (2) the costs of switching from Kodak to another product after purchasing the equipment that is, whether high switching costs will "lock-in" consumers to Kodak machines.[7] Id. at 2086-87.

Turning back to our case, I do not believe plaintiffs have alleged sufficient facts in their amended complaint to support a market restricted to the higher education business of solely URI students. For one thing, no facts are alleged that the health insurance requirement was a hidden cost. The university has apparently required health insurance since 1968. Thus, the premiums at issue in this case were required beginning in the first semester of a student's enrollment at URI. Presumably, students who did not want to buy health insurance had enough information at that stage to decide whether to matriculate at URI or choose another school. This easily discoverable information helps distinguish this case from the facts in Kodak, where there was a factual question concerning the availability of information about future repair costs when the Kodak equipment was originally purchased.

In addition, plaintiffs do not present any facts in the amended complaint that point to the inability of students to transfer to other schools. There are no facts on the costs of switching schools. There are no facts on transferring URI credits. Nor are there any facts on the comparative costs of public and private schools inside and outside of Rhode Island. Plaintiffs simply rely on conclusory statements in their

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[7] Also critical to the Supreme Court's denial of summary judgement on the §1 tying claims was evidence "that Kodak's control over the parts market has excluded service competition, boosted service prices and forced unwilling consumption of Kodak service." 112 S.Ct at 2081.

supporting memoranda to carry the day.

No further analysis of the tying claims is necessary. I need not determine whether plaintiffs have alleged facts sufficient to demonstrate that a substantial volume of commerce in the tied product market was affected.

3. Monopolization Claims Under §2 of the Sherman Act

Plaintiffs' final grouping of antitrust claims fall under §2 of the Sherman Act, which states that "[e]very person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony..." 15 U.S.C. §2. "'The offense of monopoly under §2 of the Sherman Act has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historical accident.'" Kodak, 112 S.Ct. at 2089 (quoting United States v. Grinnell Corp., 384 U.S. 563, 570-71 (1966)). "Monopoly power is the power to control market prices or exclude competition." United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 391 (1956). See also Kodak, 112 S.Ct. at 2090. In simple terms, the relevant market is composed of (1) the product market and (2) the geographic area involved. See du Pont 351 U.S. at 404; Brown Shoe Co. v. United States, 370 U.S. 294, 324 (1962). The relevant product market generally consists "of products that have reasonable interchangeability for the purposes for which they are produced," taking into consideration price, use and quality. du Pont, 351 U.S. at 404. This determination often involves an evaluation of the "cross-elasticity" of demand between products or "the degree that buyers of one product switch to the other in response to price changes." H.J. Inc. v. ITT, 867 F.2d 1531, 1538 (8th

Cir. 1989).

Plaintiffs' claims here can best be characterized as alleging a conspiracy to monopolize.[8] First, they allege that LINA and URI conspired to monopolize for the URI health clinic "the health care business" of URI students enrolled in the LINA plan. Amended Complaint at ¶ 128. Second, they allege that LINA and URI conspired to monopolize the "health risk coverage of those URI students whose health was not already insured elsewhere. Complaint at ¶¶ 155 and 254 (emphasis in original). In other words, URI and LINA targeted their marketing efforts at those students who were not already covered by an "automatic" source of insurance (e.g., a parent's or spouse's policy) and thus "had to go shopping in order to become insured." Plaintiffs' Abbreviated Memorandum at 30.

Courts have articulated three elements of a conspiracy to monopolize: (1) the existence of a combination or conspiracy; (2) an overt act in furtherance of the conspiracy; and (3) specific intent to monopolize. See Seagood Trading Corp. v. Jerrico Inc., 924 F.2d 1555, 1576 (11th Cir. 1991);

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[8] Both plaintiffs and defendants have characterized these §2 claims as "attempted monopolization" rather than conspiracy to monopolize. In my view, conspiracy to monopolize is a better label because the claims allege a conspiracy between two entities URI and LINA. In any case, the choice of category is not critical to the outcome. As discussed below, plaintiffs have failed to allege a specific intent to monopolize in the relevant market an essential element for both attempted monopolization and conspiracy to monopolize. Compare Spectrum Sports. Inc. v. McQuillan, _ U.S. _, 113 S.Ct. 884, 890-892 (1993)(elements of attempted monopolization) with Seagood Trading Corp. v. Jerrico. Inc., 924 F.2d 1555, 1576 (11th Cir. 1991)(elements of conspiracy to monopolize) and Volvo North America Corp. v. Men's Int'l Professional Tennis Council, 857 F.2d 55, 74 (2nd Cir. 1988)(same). Moreover, conspiracy to monopolize might be viewed as an easier claim to plead than attempted monopolization because the plaintiff need not address the element of a "dangerous probability of success" in the market. ABA, Antitrust Law Developments at 272.

Volvo North America Corp. v. Men's Int'l Professional Tennis Council, 857 F.2d 55, 74 (2nd Cir. 1988); Dreiling v. Peugeot Motors of American Inc., 850 F.2d 1373, 1382 (10th Cir. 1988). See also ABA, Antitrust Law Developments at 270 (collecting cases). Assuming plaintiffs have properly alleged the existence of a combination or conspiracy and an overt act, the amended complaint does not allege sufficient facts to show a specific intent to monopolize for either of the §2 claims. More precisely, neither claim alleges a specific intent to monopolize a relevant market.

With respect to the first claim, plaintiffs appear to assert that the relevant market is the type of medical services available at the URI health clinic for LINA-insured students. In support of this market definition, plaintiffs make an incomprehensible declaration: "Obviously there is nothing reasonably interchangeable with the health care available at the URI clinic, as, by their nature, medical services and techniques are highly specialized. For instance, there are no reasonable substitutes for any of the following: x-rays, laboratory tests, gynecological tests, or orthopedic services." Plaintiffs' Original Memorandum at 195.

I recognize that in certain circumstances a single brand of product or service can constitute the relevant market under the Sherman Act. Kodak, 112 S.Ct. at 2090. In the case at bar, however, plaintiffs do not present any facts to show why the relevant market for this §2 monopolization claim should be limited to URI health clinic services for students enrolled in the LINA plan. Under the facts alleged, students voluntarily chose to subscribe to the LINA-URI health care arrangement -- a set-up that provided insurance coverage only if students first visited the URI health clinic. If the LINA-URI option did not appeal to them, they could subscribe to a "comparable" plan with an alternative health care scheme. While the LINA plan was designed to "dovetail" with the URI health clinic services, the amended complaint does not allege sufficient facts to indicate that these "comparable"

plans were not "reasonably interchangeable" with LINA either in cost or in quality of health care coverage. Equally significant in light of Kodak, students were not "locked-in" to the LINA plan they could easily switch carriers at the end of the year.

Thus, based upon amended complaint, the relevant market for plaintiffs' first §2 claim must, at a minimum, include LINA and other "comparable" health care plans available to URI students.[9] In this broader market, plaintiffs have not alleged any facts to indicate a specific intent to monopolize. Indeed, as noted, URI's program enabled the majority of URI students to enroll in non-LINA plans.

Focusing on the second monopolization allegation, plaintiffs suggest that the relevant market is limited to health insurance available to those students "whose health was not already insured elsewhere." This is another attempt by

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[9] This position is supported by one pre-Kodak U.S. District Court case from New York, Metropolitan Life Insurance Co. v. Adler, 1988 U.S. Dist. LEXIS 1146, 1988-1 Trade Cases ¶ 67,907 (S.D.N.Y. 1988). In that case, the defendant, Dr. Adler, brought a §2 antitrust counterclaim alleging that Metropolitan Life Insurance Company sought to limit any competition that could affect its alleged monopoly of group medical insurance for New York State employees. Specifically, Adler charged that Metropolitan Life attempted to deprive members of the insurance plan of the physician of their choice solely to enhance profits and lower costs. 1988 U.S. Dist. LEXIS 1146, at *10. Adler contended that the relevant market for this monopolization allegation was limited to the employees of New York State covered by the plaintiffs' health insurance plans. Id. at *11-12.

The Court dismissed the counterclaim. It found, among other things, that Adler had failed to plead an appropriate market definition. The Court wrote: "...Dr. Adler attempts to allege a monopoly simply by definition of the market. Surely the relevant market cannot be those New York State employees who have opted to subscribe to Metropolitan's health insurance. In such a case, there could be no finding other than one of monopoly." Id. at *12.

plaintiffs to bootstrap an antitrust claim to a narrowly drawn market. But this market definition makes no sense. This subset of students -- if this group can be delineated at all -- was equally free to choose or reject LINA. Plaintiffs have not proffered any facts to indicate that these students were somehow forced into buying the LINA plan, or that they faced different options than other URI students choosing among insurance carriers. Thus, the relevant market for this claim must also be broader than defined by plaintiffs encompassing at least LINA and "comparable" insurance plans. And, once again, there are no facts alleged to show a specific intent to monopolize this type of market.

In sum, none of the federal antitrust allegations state a valid claim. All of these claims are dismissed.

B. Equal Protection Claims

I now examine plaintiffs' federal equal protection claims under the Fourteenth Amendment (Count IX). The gravamen of these claims is that URI and LINA intentionally charged male students the same amount in health clinic fees and insurance premiums as female students, even though a portion of these costs were exclusively spent on medical services for women (e.g., gynecological care). This structure, plaintiffs assert, discriminated against male students on the basis of sex and denied them the equal protection of the law.

The Equal Protection Clause of the Fourteenth Amendment declares that no State shall "deny to any person within its jurisdiction the equal protection of the laws." The constitutional command "is essentially a direction that all persons similarly situated should be treated alike." Cleburne v. Cleburne Living Center, 473 U.S. 432, 439 (1985). Even assuming the operations of URI and LINA constituted state-action for purposes of the Fourteenth Amendment, plaintiffs' equal protection claims are meritless.

It is now a bedrock principle that to prove an equal protection claim, a plaintiff must demonstrate that the defendant acted with discriminatory intent or purpose. See Washington v. Davis, 426 U.S. 229, 239-42 (1976); Lipsett v. University of Puerto Rico, 864 F.2d 881, 896 (1st Cir. 1988). And "'[d]iscriminatory purpose'... implies more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker...selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." Personnel Administrator of Massachusetts v. Feeney, 442 U.S. 256, 279 (1979)(citation omitted). See also McCleskey v. Kemp, 481 U.S. 279, 298 (1987).

In this case, plaintiffs have not pled any facts to indicate that URI or LINA intentionally discriminated against male students in the imposition of the clinic fees or insurance premiums. Plaintiffs simply complain that URI and LINA were cognizant that a portion of these costs were funneled into women's health services. Indulging all reasonable inferences in favor of plaintiffs, I do not see how this naked allegation states a claim under the Equal Protection clause. As the First Circuit has recently stated:

> To survive a motion to dismiss, an equal protection claim "must 'outline facts sufficient to convey specific instances of unlawful discrimination.'" A plaintiff "may not prevail simply by asserting an inequity and tacking on the self-serving conclusion that the defendant was motivated by a discriminatory animus." Coyne v. City of Somerville, 972 F.2d 440, 444 (1st Cir. 1992)(citations omitted).

In conclusion, without sufficient facts to indicate discriminatory intent or purpose, plaintiffs' federal equal protection claims must be dismissed.

C. Due Process Claims

Plaintiffs also plead separate claims under the Due Process Clause of the Fourteenth Amendment (Count XII). They assert that URI's mandatory clinic fee and insurance requirement deprive students of liberty "to contract" and "of property." Plaintiffs are particularly troubled by URI's policy of automatically billing for LINA if a student did not pick another insurance carrier, and of URI's policy of prohibiting registration if students did not pay their LINA bill.

The Due Process Clause of the Fourteenth Amendment provides that no State shall "deprive property, without due process any person of life, liberty, or of law." Plaintiffs appear to allege a substantive due process violation based upon the right or liberty to contract. They ground this argument on language contained in the 1923 Supreme Court case, Meyer v. Nebraska, 262 U.S. 390, 399 (1923):

> While this court has not attempted to define with exactness the liberty ... guaranteed [by the Fourteenth Amendment], the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men. (emphasis added).

While these are majestic words, since the 1930s the Supreme Court has severely curtailed substantive due process theories based on economic assertions and the right to contract. See Ferguson v. Skrupa, 372 U.S. 726 (1963) (upholding Kansas statute making it a misdemeanor to engage in business of debt adjustment except as incident to practice of law); West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937)(upholding Washington State statute establishing minimum wages for women); Nebbia v. New York, 291 U.S. 502 (1934)(upholding New York Milk Board's order fixing milk prices for distributors and storekeepers). See also Tenoco Oil Co. v. Department of Consumer Affairs, 876 F.2d 1013, 1021 (1st Cir. 1989)("Since 1937, when 'substantive' due process lost favor, courts have reviewed economic legislation with great deference to the legislature's policies..."). "It is by now well established that legislative Acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality, and that the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way." Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 15 (1976). See also Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust For Southern California, _ U.S. _, 113 S.Ct. 2264, 2287 (1993).

Even assuming URI is a state actor, and assuming further that the factual setting in this case implicates the right to contract, plaintiffs' amended complaint still fails to state a valid substantive due process claim. Plaintiffs fail to allege any facts that URI or LINA acted in an arbitrary or irrational manner. Nor do they cite any specific authority to support their broad assertions of constitutional harm. Simply put, under the broadest reading of the amended complaint, plaintiffs' disfavored economic due process allegations must be dismissed.

IV. Conclusion

In sum, I dismiss with prejudice plaintiffs' federal antitrust, equal protection and due process claims. In the absence of any federal claims, this case lacks original jurisdiction in this Court. Within my discretion, I respectfully decline to exercise supplemental jurisdiction over the remaining state claims. See 28 U.S.C. §1367(c)(3). I wish to emphasize that this ruling in no way reflects on the merits of those state claims. All state law claims are dismissed without prejudice.

SO ORDERED:

Raymond J. Pettine
Senior U.S. District Judge

August 5, 1993

Entered as an Order of this Court August 5, 1993

Deputy Clerk

APPENDIX § C

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 93-1988

TONY LEE, ET AL.,

Plaintiffs-Appellants

v.

LIFE INSURANCE COMPANY OF NORTH AMERICA, ET AL.,

Defendants-Appellees

BEFORE

*

ALDRICH, SENIOR CIRCUIT JUDGE,
TORUELLA, SELYA, CYR, BOUDIN AND STAHL,
CIRCUIT JUDGES

ORDER OF COURT

Entered June 16, 1994

The panel of judges that rendered the decision in this case having voted to deny the petition for rehearing and the suggestion for the holding of a rehearing en banc having been

carefully considered by the judges of the Court in regular active service and a majority of said judges not having voted to order that the appeal be heard or reheard by the Court en banc,

It is ordered that the petition for rehearing and the suggestion for rehearing en banc be denied.

By the Court

Francis P. Scigliano Clerk

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* Chief Judge Stephen Breyer did not participate

[cc.: Messrs. Banks, Goodman and Proger]

APPENDIX § D

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED IN THE C[illegible]

U.S. Const. amend. VII

"In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

U.S. Const. amend. IX

"The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

U.S. Const. amend. XIV

"*** nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

R.I. Const. Art. VI, §§ 1 and 2

"Section 1. Constitution supreme law of the state. - This Constitution shall be the supreme law of the state, and any law inconsistent therewith shall be void. The general

assembly shall pass all laws necessary to carry this Constitution into effect.

Section 2. Power vested in general Assembly - Concurrence of houses required to enact laws - Style of laws. - The legislative power, under this Constitution, shall be vested in two houses, the one to be called the senate, the other the house of representatives; and both together the general assembly. The concurrence of the two houses shall be necessary to the enactment of laws. The style of their laws shall be, It is enacted by the general assembly as follows:"

§ 1 Sherman Act, 15 U.S.C. § 1

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court."

R.I. Department of Business Regulation's Regulation 23 Part XI - Filing of Forms and Rates, §§ 1, 2, and, 3 are promulgated pursuant to Rhode Island General Laws § 42-62-12 and have the purposes stated below.

> "Insurance Regulation 23 was promulgated pursuant to G.L. 195[illegible] (1977 Reenactment) § 42-62-12. That section authorizes the making of regulations for health service contracts. The purpose of the regulations is to establish minimum standards to which all health-benefit

> plans issued, delivered, or offered for sale in Rhode Island must comply. Pursuant to § 42-62-12, the director of the Department of Business Regulation has the authority to promulgate rules and regulations **establishing minimum standards with which insurers must comply in order for their plans to qualify.** Subsection (c) of § 42-62-12 provides that after promulgation of the regulations, **samples of proposed contracts shall be filed with the director for a hearing or other review.** The director shall take affirmative action within a reasonable time to approve, disapprove or modify the proposed form. **The statutory standards governing the director's approval seek to ensure mainly the public's protection against misleading or deceptive practices."** *Formisano v. Blue Cross of Rhode Island*, 478 A.2d 167, 170 (R.I. 1984). (Emphases added.)

DBR's Regulation 23, Part XI, §§ 1, 2, and, 3, in pertinent part:

"Part XI - Filing of Forms and Rates

Section 1.

> No health benefit contract shall be issued or delivered to any person in this state nor shall any application, rider, endorsement, individual certificate, subscriber contract or group master contract to be used in connection therewith be issued or delivered **until** a copy of the form thereof and of the classification of risks and the premium rates or the rating formula have been **approved** by the Director of Business

Regulation. ***

1. No forms *** shall be approved unless such forms are in compliance with this regulation.

***

Section 2.

No such contract shall be issued, nor shall any application, rider, endorsement, individual certificate, subscriber contract, or group master contract be used in connection therewith, until the expiration of sixty (60) days after it has been so filed unless the Director of Business Regulation shall sooner give written approval thereto, ***.

Section 3.

The Director of Business Regulation may ... after filing of any such [policy] form disapprove such form *** (2) if it contains a provision or provisions which are unjust, unfair, inequitable, misleading, deceptive or encourage misrepresentation of such contract. If the Director of Business Regulation shall notify the insurer which has filed any such form that it does not comply with the applicable laws and regulations, it shall be unlawful thereafter for such insurer to issue such form or use it in connection with any contract. ***." Pages 126.55-R to 126.56-R of Regulation 23. (All emphases added.)

Counting distinct campuses separately, there are well over a hundred State universities that have mandatory health services fees. These fees finance the university health clinics and are unisex. Consequently, *hundreds of thousands of State university students pay these mandatory fees*. California[10] and Texas[11] combined have over 50 State universities, and no States, except Delaware, Rhode Island, and Wyoming, have less than two State universities. Most States have many more than two State universities. New York, for instance, has over 20 State universities.[12]

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[10] California State University at: Bakersfield, Chico, Dominguez Hills, Fresno, Fullerton, Hayward, Long Beach, Los Angeles, Northridge, Sacramento, San Bernardino, San Marcos, Stanislaus. Humboldt State University, San Diego State University, San Francisco State University, San Jose State University, Sonoma State University. University of California at: Berkeley, Davis, Irvine, Los Angeles, Riverside, San Diego, Santa Barbara, and Santa Cruz.

[11] Angelo State University, East Texas State University, East Texas State University at Texarkana, Lamar University-Beaumont, Midwestern State University, Prairie View A&M University, Sam Houston State University, Southwest Texas State University, Stephen F. Austin State University, Sul Ross State University, Tarleton State University, Texas A&M University, Texas A&M University at Galveston, Texas A&M University-Corpus Christi, Texas A&M University-Kingsville, Texas Southern University, Texas Tech University, University of Houston, University of Houston-Clear Lake, University of Houston-Downtown, University of Houston-Victoria, University of North Texas. University of Texas at: Arlington, Austin, Brownsville, Dallas, El Paso, San Antonio, and Tyler. University of Texas-Pan American.

[12] The statistics are based on data supplied to Peterson's Guides, Inc. by the universities themselves, and reproduced in "Peterson's Guide to Four Year Colleges 1995", © 1994.

Quoted and/or cited below are various State laws that prevent or impede members of one sex from buying health insurance that excludes coverage solely useable by the opposite sex.

Montana Code Ann. § 49-2-309(1)

"It is an unlawful discriminatory practice for any financial institution or person to discriminate solely on the basis of sex or marital status in the issuance or operation of any type of insurance policy, plan, or coverage or in any pension retirement plan, program or coverage, including discrimination in regard to rates or premiums and payments or benefits."

Nevada Stat. Title 57, ch. 689A, § 689A.0405(1)

"A policy of health insurance must provide coverage for benefits payable for expenses incurred for:

(a) An annual cytologic screening test for women 18 years of age or older;
(b) A baseline mammogram for women between the ages of 35 and 40; and
(c) An annual mammogram for women 40 years of age or older."

The National Association of Insurance Commissioners, NAIC, has drafted a so-called "Model Regulation to Eliminate Unfair Sex Discrimination". Many States have responded to said regulation by adopting it in whole or by

passing similar legislation[13]. Related legislation or regulations have also been become law in several other States[14]. Under this NAIC regulation normal pregnancy is not regarded as a sickness or injury, but, the regulation prohibits insurers from "treating complications arising from pregnancy differently from other forms of illness or sickness covered by an insurance contract"[15]. Males cannot possibly suffer from complications arising from pregnancy, and so such a regulation violates the Equal Protection Clause if the students' position is correct. Another prohibited practice under the NAIC regulation is "*** excluding benefits relating to coverage involving the genital organs of one sex only"[16]. Again, this violates the Equal Protection Clause if the

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[13] The NAIC currently lists the following as the adopting States: **Ariz.** Admin. Comp. R4-14-209 (1977), **Ark.** Ins. Rule & Reg. 19 (1985), **Cal.** Admin. Code tit. 10 §§ 2560 to 2560.6 (1973), **Fla.** Admin. Code § 4-43.001 (1978), **Ill.** Admin. Reg. tit. 50 §§ 2603.10 to 2603.60 (1976), **Iowa** Admin. Code §§ 191-15.50 to 191-15.54 (1978), **Kan.** Admin. Regs. § 40-1-31 (1977/1986); Bulletin No. 1977-3, **Mo.** Rev. Stat. § 375.995 (1986), **Mont.** Ins. Dept. reg. §§ 6.6.1202 to 6.6.1203 (1979), **Neb.** Admin. R. tit. 210 ch. 28 (1977), **Nev.** Ins. Reg. § 686A.110 to 686A.150 (1977), **N.C.** Admin. Code tit. 11 ch. 4 § 0317 (1979), **N.D.** Admin. Code §§ 45-03-10-01 to 45-03-10-04 (1988), **Okla.** Ins. Regs. § 365:10-1-9 (1993), 31 **Pa.** Admin. Code. §§ 145.1 to 145.5 (1977), **S.D.** Codified Laws Ann. §§ 58-33-13.1 to 58-33-13.2 (1980) (Part of model), **Tenn.** Ins. Rules ch. 0780-1-34 (1976), **Tex.** Admin. Code §§ 21.401 to 21.409 (1978/1985), **Utah** Ins. R590-83 (1980/1989), and, **Wis.** Admin. Code § Ins. 6.55 (1976).

[14] The NAIC currently lists the following as these other States: **Mich.** Comp. Laws § 500.2027 (1977), **Minn.** Stat. § 62E.08 (1982), **N.J.** Admin. Code tit. 11 §§ 1-4.2 to 1-4.3 (1975/1986), **N.Y.** Ins. Reg. § 52.41 (1983); N.Y. Ins. Law § 2607 (1984), **Or.** Admin. R. §§ 836-80-050 to 836-80-060 (1975), **Vt.** Admin. Comp. Ins. Dept. R. I-89-1 (1989) (Maternity coverage must be provided), and, **Wash.** Rev. Code. § 48.30.300 (1975-76).

[15] ¶ 6 NAIC Model Regulation Service, 160-1 (January 1977).

[16] ¶ 7 NAIC Model Regulation Service, 160-1 (January 1977).

students' position is correct.

Potential effect on States' Equal Rights Amendments

At least 18 States have Equal Rights Amendments to their respective State Constitutions. All of these Amendments would be affected by a holding that every person has a federal Equal Protection right freely to buy health insurance that excludes coverage solely useable by the opposite sex. The language of all 18 Amendments is such, that, all 18 Amendments fairly and reasonably *could* be construed consistent with that holding. If the Court makes that holding, these Amendments *should* be so construed by the States, to preserve their federal constitutionality.

These 18 ERA Amendments are in: Alaska[1], Colorado[2], Connecticut[3], Hawaii[4], Illinois[5], Louisiana[6],

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[1] Alaska Const. art. 1, § 3. "No person is to be denied the enjoyment of any civil or political right because of *** sex ****"

[2] Colo. Const. art. 2 § 29. ""Equality of rights under the law shall not be denied or abridged by the state of Colorado or any of its political subdivisions on account of sex ***."

[3] Conn. Const. art. I, § 20. "No person shall be denied the equal protection of the law nor be subjected to segregation or discrimination in the exercise or enjoyment of his or her civil or political rights because of *** sex ***."

[4] "Equality of rights under the law shall not be denied or abridged by the State on account of sex ***." Hawaii Const. art. I, § 3. "No person shall be *** denied the equal protection of the laws, nor be denied the enjoyment of the person's civil rights or be discriminated against in the exercise thereof because of *** sex ***." Hawaii Const. art. I, § 5

[5] Ill. Const. art. I § 18. "The equal protection of the laws shall not be denied or abridged on account of sex by the State or its units of local government and school districts."

Maryland[7], Massachusetts[8], Montana[9], New Hampshire[10], New Mexico[11], Pennsylvania[12], Rhode Island[13], Texas[14],

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[6] La. Const., art. 1, § 3. "No person shall be denied the equal protection of the laws. *** No law shall arbitrarily, capriciously, or unreasonably discriminate against a person because of *** sex ****"

[7] Md. Const. declaration of rights, art. 46. "Equality of rights under the law shall not be abridged or denied because of sex."

[8] Mass. Const. pt. 1, art. 1. "**** Equality under the law shall not be denied or abridged because of sex, ****"

[9] Mont. Const. art. II, § 4. "The dignity of the human being is inviolable. No person shall be denied the equal protection of the laws. Neither the state nor any person, firm, corporation, or institution shall discriminate against any person in the exercise of his civil or political rights on account of *** sex ****"

[10] N.H. Const. pt. 1, art. 2. "All men have certain natural, essential, and inherent rights - among which are: the enjoying and defending life and liberty, acquiring, possessing, and protecting property, and, in a word, of seeking and obtaining happiness. Equality of rights under the law shall not be denied or abridged by this state on account of *** sex ****"

[11] N.M. Const. art. II, § 18. " *** nor shall any person be denied equal protection of the laws. Equality of rights under law shall not be denied on account of the sex of any person. ****"

[12] Pa. Const. art. 1, § 28. "Equality of rights under the law shall not be denied or abridged in the Commonwealth of Pennsylvania because of the sex of the individual."

[13] R.I. Const. art. 1, § 2. "**** nor shall any person be denied equal protection of the laws. No otherwise qualified person shall, solely by reason of ** gender *** be subject to discrimination by the state, its agents or any person or entity doing business with the state. Nothing in this section shall be construed to grant or secure any right relating to abortion or the funding thereof."

[14] Tex. Const. art. 1, § 3a. "Equality under the law shall not be denied or abridged because of sex ***.

Utah[15], Virginia[16], Washington[17], and Wyoming[18].

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[15] Utah Const. art. IV, § 1. "The rights of citizens of the State of Utah to vote and hold office shall not be abridged on account of sex. Both male and female citizens of this State shall enjoy equally all civil, political and religious rights and privileges."

[16] Va. Const. Art. I, § 11. "*** the right to be free from any governmental discrimination upon the basis of *** sex *** shall not be abridged, except that the mere separation of the sexes shall not be considered discrimination."

[17] Wash. Const. art. XXXI, § 1. "Equality of rights and responsibility under the law shall not be denied or abridged on account of sex."

[18] Wyo. Const. art. 6, § 1. "The rights of citizens of the State of Wyoming to vote and hold office shall not be abridged on account of sex. Both male and female citizens of this state shall enjoy all civil, political and religious rights and privileges."